SC93296

IN THE
MISSOURI SUPREME COURT

STATE OF MISSOURI,

Respondent,

v.

TYOKA L. LOVELADY,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri,
16th Judicial Circuit
The Honorable W. Brent Powell, Judge
Division 11

APPELLANT'S SUBSTITUTE REPLY BRIEF

SUSAN L. HOGAN, #33194
Appellate Defender
Office of the State Public Defender
Western Appellate/PCR Division
920 Main Street, Suite 500
Kansas City, Missouri 64105
Tel: (816)889-7699
Fax: (816)889-2001
susan.hogan@mspd.mo.gov

Counsel for Appellant

INDEX

TABLE OF AUTHORITIES

CASES

STATUTES

UNITED STATES CONSTITUTION

MISSOURI CONSTITUTION

JURISDICTIONAL STATEMENT

Tyoka L. Lovelady adopts and incorporates by reference the Jurisdictional Statement set forth in his opening Substitute Brief, filed in this case on July 25, 2013.

STATEMENT OF FACTS

Tyoka L. Lovelady adopts and incorporates by reference the Statement of Facts set forth in his opening Substitute Brief, filed in this case on July 25, 2013.

POINT RELIED ON

The trial court clearly erred in overruling Appellant's motion to suppress physical evidence and in ruling that the state could present evidence about the discovery, seizure, and testing of the cocaine base, because the evidence was obtained as a result of Appellant's unlawful search and seizure and therefore should have been excluded as fruit of the poisonous tree, in that Appellant was denied his rights to be free from unreasonable searches and seizures and to due process of law, as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 15 of the Missouri Constitution, in that once the officers who detained Appellant took the gun and determined that it was a toy, the purpose of the stop was satisfied and there was no justification for Appellant's continued detention or for the subsequent computer check for warrants.

Terry v. Ohio, 392 U.S. 1 (1968);

Arizona v. Evans, 514 U.S. 1 (1995);

State v. Grayson, 336 S.W.3d 138 (Mo. 2011);

State v. Deck, 994 S.W.2d 527 (Mo. banc 1999);

U.S. Const., Amend. IV, V and XIV;

42 U.S.C. Section 1983;

Mo. Const. Art. I, §§ 10 and 15; and

Sections 307.190, 307.193, and 542.296, RSMo 2000.

ARGUMENT

The trial court clearly erred in overruling Appellant's motion to suppress physical evidence and in ruling that the state could present evidence about the discovery, seizure, and testing of the cocaine base, because the evidence was obtained as a result of Appellant's unlawful search and seizure and therefore should have been excluded as fruit of the poisonous tree, in that Appellant was denied his rights to be free from unreasonable searches and seizures and to due process of law, as guaranteed by the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 15 of the Missouri Constitution, in that once the officers who detained Appellant took the gun and determined that it was a toy, the purpose of the stop was satisfied and there was no justification for Appellant's continued detention or for the subsequent computer check for warrants.

Respondent asserts that the officers in this case did not violate Mr. Lovelady's rights when, having disarmed him of his toy gun, they asked him for his name and then held him for a few minutes to conduct a warrant check (Resp. Br. 21-22). Respondent relies on *Klaucke v. Daly*, 595 F.3d 20 (1st Cir. 2010) and quotes *Klaucke* as holding, "most federal courts have held that an officer does not impermissibly expand the scope of a *Terry* stop by performing a background and warrant check, even where that search is unrelated to the circumstances that initially drew the officer's attention." 595 F.3d at 26. Respondent implies that a warrant check is permitted in every instance, so long as it is

conducted quickly (Resp. Br. 22-23). Respondent overstates the extent to which *Klaucke* supports the state's position.

The court in *Klaucke* specifically cited *United States v. Kirksey*, 485 F.3d 955, 957 (7th Cir. 2007), for the proposition that "when an individual '*remains under suspicion for committing a crime*, the officer can take a reasonable amount of time to check for outstanding warrants of criminal history, even if the initial justification for the stop had nothing to do with criminal history" (emphasis added). Here, there was no justification for checking for outstanding warrants, because there was no indication that Mr. Lovelady *was or remained* suspected of committing a crime. While the officers found his behavior to be "off", they did not articulate any suspicion that he had committed a crime, and the only reason they stopped Mr. Lovelady was because he appeared to have a gun (Tr. 11-13, 21-22, 23-25, 40-41, 63-64).

Additionally, the facts in *Klaucke* are distinguishable from this case. Klaucke was a twenty-one-year old college student who looked younger than his years and was seen walking, on the evening of Cinco de Mayo, with a group of four friends on their way to a party. *Id.* at 22. Three of the others in the group were visibly carrying alcohol as they walked, and Klaucke was wearing a backpack and carrying a grocery sack, which was later found to hold six loose cans of beer. *Id.* Everyone in the group, including Klaucke, was over 21, which was the minimum age to legally possess alcohol in Massachusetts. *Id.* The area where the group was walking was known for a high incidence of underage drinking and student crime, and the first two weeks of May typically brought an increase in such incidents . *Id.*

An officer approached Klaucke's group and asked each member if he or she was over 21 years old. *Id.* They all answered that they were, and the officer asked to see identification to confirm their age. *Id.* Everyone in the group immediately complied, except for Klaucke. *Id.* Klaucke refused to hand over his identification and asserted his Fourth Amendment rights. *Id.* The officer replied that he suspected that Klaucke was underage and had alcohol in his bag and again demanded that Klaucke produce his identification. *Id.* at 22-23. Klaucke again refused, and the two went back and forth for a few minutes, until the officer told Klaucke that if he continued to refuse to produce his identification, the officer would assume that Klaucke was underage and in possession of alcohol and would arrest him and figure out his age during the booking process. *Id.* at 23. Klaucke then produced his driver's license, which verified that he was 21. *Id.*

The officer kept Klaucke's identification while he had the dispatcher check the validity of the license and check for outstanding arrest warrants. *Id.* The officer testified that he suspected Klaucke might have outstanding warrants, in light of his adamant refusal to produce his identification. *Id.* The officer confirmed that the license was real and that Klaucke did not have any outstanding warrants, then he returned the identification and Klaucke and his friends went on their way. *Id.*

Klaucke asserted a claim under 42 U.S.C. Section 1983, alleging that his Fourth Amendment rights were violated when the officer detained Klaucke, demanded identification, and briefly retained his driver's license in order to confirm its validity and check for outstanding warrants. *Id.* at 22, 23. The federal Court of Appeals affirmed the District Court's grant of the officer's motion for summary judgment. *Id.* at 22, 23. The

court noted that under *Terry v. Ohio,* 392 U.S. 1, 30 (1968), an officer may briefly detain an individual for questioning if the officer has a reasonable suspicion supported by articulable facts that criminal activity may be afoot. *Klaucke,* 595 F.3d at 24. The court further noted that, in determining whether a *Terry* stop is justified, the court must conduct a two-step inquiry: First, whether the officer's action was justified at its inception, and second, whether it was reasonably related in scope to the circumstances which justified the interference in the first place. *Klaucke,* 595 F.3d at 24; *Terry,* 392 U.S. at 20.

The court in *Klaucke* found that the circumstances were sufficient to support a reasonable suspicion that Klaucke was a minor in possession of alcohol in violation of state law. 595 F.3d at 25. The court noted that Klaucke's age and appearance justified the reasonable suspicion that he was under 21, and the fact that he was with other young people who were openly carrying alcohol would allow a reasonable officer to suspect that Klaucke was carrying alcohol in the grocery sack. *Id.* Additionally, the officer was patrolling an area known for undergraduate drinking on a Saturday night holiday during a time of year associated with student partying. *Id.* The court found that the officer's demand to see identification was reasonably related to his suspicion that Klaucke was underage. *Id.* Given Klaucke's refusal to produce identification, it was not unreasonable for the officer to verify the license. *Id.*

The court did not go so far as to say that warrant checks are always permissible in a *Terry* stop, but merely found that under the circumstances, Klaucke's refusal to produce his license reasonably roused a suspicion that his refusal to cooperate was motivated by other considerations, such as outstanding warrants or prior arrests for

underage drinking. *Id.*at 26. The court noted that *Terry* allows an officer to shift his focus based on unfolding events in the course of a *Terry* stop, and that both verifying Klaucke's license's validity and checking for warrants were within the scope of permissible conduct. *Id.*

In Mr. Lovelady's case, there were no such "unfolding events" to justify running Mr. Lovelady's name for warrants. The officers admitted that they stopped Mr. Lovelady because he appeared to have a gun (Tr. 11-13, 22, 23-25, 40-41, 63-64). They quickly determined that the gun was an Airsoft toy gun (Tr. 16, 26, 43-44). Despite the officers' testimony that they stopped Mr. Lovelady because they saw a "gun", the state relies on other circumstances surrounding the encounter to justify Mr. Lovelady's continued detention (Resp. Br. 17-19, 21-24). These other circumstances consist of a collection of innocuous circumstances, which were only considered suspicious because they occurred in a neighborhood known for having a high crime rate (Tr. 57-58).

For example, Respondent points to testimony that the officers saw Mr. Lovelady riding his bicycle in circles around the intersection of 11th and Agnes (Tr. 10; Resp. Br. 17). Respondent misstates this evidence, claiming that Mr. Lovelady was riding his bicycle in "erratically" (Resp. Br. 21). In fact, Officer Christopher Smith testified that Mr. Lovelady was riding his bicycle in leisurely circles in the intersection (Tr. 9, 10, 20, 22, 33-34). At worst, Mr. Lovelady was "meandering" on his bicycle (Tr. 60), which is hardly the same thing as riding a bicycle erratically. Although Officer Smith testified that Mr. Lovelady seemed "off" or possibly under the influence (Tr. 12-13, 24-25), he did

not indicate that Mr. Lovelady was riding his bicycle in an unsafe manner or that he was not able to control the bicycle.

Respondent asserts that by riding his bicycle in circles, Mr. Lovelady raised a reasonable suspicion that he was involved in criminal activity (Resp. Br. 17). To support this assertion, Respondent cites Section 307.190, RSMo 2000, which requires that bicycles be safely ridden on the right side of the roadway (Resp. Br. 17). Violation of Section 307.190 is an infraction, punishable by a fine under Section 307.193, RSMo 2000. Section 307.193 specifically states, "**Such infraction does not constitute a crime** and conviction shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense" (emphasis added). That Mr. Lovelady was riding a bicycle in circles in an intersection was not a crime and does not provide any support for the officers' actions in continuing to detain Mr. Lovelady. This circumstance does not raise a reasonable suspicion of criminal activity.

Respondent also points out that the encounter with Mr. Lovelady took place around 10:30 p.m. in a neighborhood known for having criminal activity (Tr. 57-58; Resp. Br. 17-18). Mr. Lovelady was born on August 30, 1981, and he was not quite twenty-eight-years old at the time he was stopped by the officers (L.F. 8). He lived in the same block, at 1021 Agnes (L.F. 8; Tr. 20-21). As an adult, Mr. Lovelady was not under a curfew, and no law prohibited him being outside, in his own neighborhood, on a bicycle, after dark. Moreover, 10:30 at night is not extraordinarily late, especially on the Saturday night of a holiday weekend during the Spring. This circumstance also does not raise a reasonable suspicion of criminal activity.

Another factor purportedly supporting detaining Mr. Lovelady was that he waved and pointed westward down the street, while saying, "They went that way" (Tr. 10-11, 13, 21; Resp. Br. 18). Officer Smith tried to get more information, but Mr. Lovelady was not able to provide any more information (Tr. 10-11, 13). This statement, whether supported by additional information or not, is vague and does not raise a reasonable suspicion that Mr. Lovelady was involved in criminal activity.

There is, in fact, an entirely innocent explanation, not ruled out by the evidence, for Mr. Lovelady to make such a statement to the officers. The phrase "They went that a'way" is a well-worn cliché from Western movies, and something that a person who was possibly intoxicated might find amusing to say to police officers. Given that the officers were not able to glean any additional information from Mr. Lovelady, it is as logical to assume that Mr. Lovelady was making a poorly-delivered and poorly-received joke as it is to assume that he or someone else was up to criminal activity. Mr. Lovelady was cooperative with the police, even if he was not able to provide information about any possible criminal activity (Tr. 10, 12, 23-25, 62-63).

Respondent also asserts that Mr. Lovelady attempted to direct the officers' attention away from himself, implying that he did not want to encounter them (Resp. Br. 18). This assertion is pure speculation. If Mr. Lovelady had wanted to avoid encountering the police, it would have made more sense for him to studiously avoid any conversation or other contact with the officers, or to simply ride away in the opposite direction. Mr. Lovelady did not do either of these things. This circumstance does not raise a reasonable suspicion of criminal activity.

Addtionally, Officer Smith testified that Mr. Lovelady seemed "off" or to be under the influence of a substance foreign to his body (Tr. 13, 51; Resp. Br. 18). This factor also is not sufficient to give rise to a reasonable suspicion of criminal activity. The officers did not describe any physical manifestations or actions that would give rise to such a belief. Even if Mr. Lovelady was under the influence of something, he was not so impaired that he could not safely ride a bicycle, and he was able to immediately comply with the command to get down on the ground (Tr. 9, 10, 12, 22, 23-25).

Respondent also asserts that Mr. Lovelady presumably did not have identification with him, because he spelled out his name for the officers (Resp. Br. 23-24). Neither officer testified about whether Mr. Lovelady had identification with him when he was stopped. The state bears the burden of proof and the risk of nonpersuasion. *State v. Grayson*, 336 S.W.3d 138, 142 (Mo. 2011); Section 542.296.6, RSMo 2000. The state failed to introduce any evidence on this matter at the suppression hearing. The absence of any evidence about whether Mr. Lovelady had identification cannot be resolved in favor of the state, as asserted in Respondent's brief (Resp. Br. 23-24). Such a claim is completely unsupported by the evidence adduced at the suppression hearing. There was no claim that the warrant check was done because Mr. Lovelady was not able to produce identification. This circumstance does not raise a reasonable suspicion of criminal activity.

The discovery of a kitchen knife in Mr. Lovelady's pocket does not retroactively justify prolonging the stop (Resp. Br. 23). Neither officer claimed to have suspected that Mr. Lovelady had a knife or anything else that might be considered a weapon, once they

took the "gun" out of his waistband. The officers had disarmed Mr. Lovelady of their sole reason for stopping him, and had discovered that the "gun" was merely a toy Airsoft gun (Tr. 11-13, 16, 22, 23-25, 26, 40-41, 43-44, 63-64). Once the reason for the stop was dispelled, the officers had to let Mr. Lovelady go. Nothing about the situation justified continuing to detain Mr. Lovelady or running his name for warrants.

Respondent also contends that Mr. Lovelady seeks to set a strict time limit on the length of a *Terry* stop (Resp. Br. 25-26). This is false. The only time limit that Mr. Lovelady asks this Court to follow is the time limit allowed by *Terry v. Ohio*. As noted above, if a law enforcement officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot," the officer may **briefly** stop the suspicious person and make "reasonable inquiries" aimed at confirming or dispelling his suspicions. *Terry*, 392 U.S. at 30 (emphasis added). A *Terry* stop is valid only so long as it is "based on reasonable suspicion supported by articulable facts that the person stopped is engaged in criminal activity." *Grayson*, 336 S.W.3d at 143; *quoting*, *State v. Deck*, 994 S.W.2d 527, 534 (Mo. banc 1999).

Mr. Lovelady acknowledges that there is no set time limit for a permissible *Terry* stop. *See, e.g., United States v. Sharp*, 470 U.S. 675, 685-686 (1985). Just as there is no maximum time limit, there should be no set minimum time for an officer to detain someone. Regardless of the brevity of the encounter, once the officers in this case determined that Mr. Lovelady had a toy gun, the officers could no longer have any reasonable suspicion that Mr. Lovelady might be involved in criminal activity. The evidence introduced at the hearing on the motion to suppress, and relied on at trial, did

not establish a specific, articulable set of facts that would justify continuing to detain Mr. Lovelady after he had been disarmed and his gun was found to be a toy. Even though the encounter was brief, the officers were not justified in continuing to detain Mr. Lovelady.

All evidence obtained as a result of the illegal detention must be excluded; thus, the trial court erred in overruling the motion to suppress and in admitting the evidence at trial. *Arizona v. Evans*, 514 U.S. 1 (1995). Mr. Lovelady again respectfully requests that this Court reverse and vacate his conviction and sentence for possession of a controlled substance and remand the case to the circuit court with instructions to order the cocaine base and resulting testimony suppressed.

CONCLUSION

Based on the Argument presented in the opening Substitute Brief and in this Reply Brief, Tyoka Lovelady respectfully requests that this Court reverse and vacate his conviction and sentence for possession of a controlled substance and remand the case to the circuit court with instructions to order the cocaine base and resulting testimony suppressed.

Respectfully submitted,

/s/ Susan L. Hogan

_____

Susan L. Hogan #33194
APPELLATE DEFENDER
Office of State Public Defender
Western Appellate Division
920 Main Street, Suite 500
Kansas City, Missouri 64105
Tel: 816/889-7699
Fax: 816/889-2001
Susan.Hogan@mspd.mo.gov

Counsel for Appellant

Certificate of Compliance and Service

I, Susan L. Hogan, hereby certify as follows:

1. The attached reply brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word 2010, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, this reply brief contains 3,265 words and does not exceed the number of words allowed for a reply brief.

2. This brief has been scanned for viruses using a Symantec Endpoint Protection program, which the Public Defender System updated on October 4, 2013. According to that program, the electronically-filed copy provided to this Court and to the Attorney General is virus-free. This brief was completed and electronically filed on October 4, 2013.

3. A true and correct copy of this brief was sent through the e-filing system on October 4, 2013, to Todd T. Smith, Assistant Attorney General, Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, at Todd.Smith@ago.mo.gov.

/s/ Susan L. Hogan

_____

Susan L. Hogan